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APPLICATION NO. FILING DATE FIRST NAMED INVENTOR ATTORNEY DOCKET NO. CONFIRMATION NO. 10/719,468 11/21/2003 George P. Sakalosky 14066.03 2597 7590 08/17/2004 **EXAMINER** Scott D. Rothenberger WEDDINGTON, KEVIN E DORSEY & WHITNEY LLP Suite 1500 ART UNIT PAPER NUMBER 50 South Sixth Street 1614 Minneapolis, MN 55402-1498

DATE MAILED: 08/17/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary Examiner Art Unit Examiner Art Unit		Application No.	Applicant(s)	
Revine Eweddington	Office Action Summary	10/719,468	SAKALOSKY, GEORGE P.	
- The MAILING DATE of this communication appears on the cover sheet with the correspondence address Period for Reply A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION. **SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION. **It has period for reply appelled above its bear billy (30) days, a reply within the statutory minimum of this (30) days will be considered timely. **It has period for reply appelled above, the nearmount addresp period will apply and will easily 80() MONTHS from the realing date of this communication. **Any reply received by the Office later than these months after the mailing date of this communication. **Any reply received by the Office later than these months after the mailing date of this communication. **Any reply received by the Office later than these months after the mailing date of this communication. **Any reply received by the Office later than these months after the mailing date of this communication. **Any reply received by the Office later than these months after the mailing date of this communication. **Any reply received by the Office later than these months after the mailing date of this communication. **This action is FINAL. **2D) IST his action is non-final. **3D) Responsive to communication(s) filed on 21 November 2003. **2a) This action is provided to since the mailing date of the communication. **Application and the period of the provided to the mailing date of the communication. **Application for the above claim(s) is/are rejected. **Application sit / 2 is/are rejected. **Application Papers** **9D) The specification is objected to by the Examiner. **10D) The drawing(s) filed on is/are rejected. **Application Papers** **9D) The provided the provided to the provided to the drawing(s) be held in abovance. See 37 CFR 1.85(a). **Replacement drawing sheet(s) including the correction is required if the drawing(s) i		Examiner	Art Unit	
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12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f). a) ☐ All b) ☐ Some * c) ☐ None of: 1. ☐ Certified copies of the priority documents have been received. 2. ☐ Certified copies of the priority documents have been received in Application No 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)). * See the attached detailed Office action for a list of the certified copies not received. Attachment(s) 1) ☐ Notice of References Cited (PTO-892) 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) 5) ☐ Notice of Informal Patent Application (PTO-152)	11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.			
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3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) 5) Notice of Informal Patent Application (PTO-152)				
Paper No(s)/Mail Date 6) Other:	2) Information Disclosure Statement(s) (PTO-1449 or PTO/SP/08)			
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Claims 1-21 are presented for examination.

Applicants' information disclosure statement filed November 21, 2003 has been received and entered.

Claim Objections

Claim 3 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F. 3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F. 2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F. 2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F. 2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F. 2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claim 1 is rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1 of U.S. Patent No. 6,660,762. Although the conflicting claims are not identical, they

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are not patentably distinct from each other because the present application teaches a method to ameliorate berylliosis in a subject with a porphyrin analogue and the patented application teaches a method to treat a subject having berylliosis with a porphyrin. The method for treating berylliosis incorporates a method to ameliorate since treating can also ameliorate (prevent) the subject from contacting the disorder again.

Claim 1 is not allowed.

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claim 1 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

Applicant's specification does not contain any test results or any experimental data showing the instant porphyrin analogues will, in fact,

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ameliorate (prevent) berylliosis in a subject not presently at risk of or predisposed to developing such a disorder.

Claim 1 is not allowed.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 2 and 4-21 are rejected under 35 U.S.C. 102(b) as being anticipated by Windholz et al. (Merck Index., Abstract No. 4534).

Windholz et al. teach a porphyrin analogue, hemin, one of applicant's preferred porphyrin. Note applicant's claims read on the porphyrin analogue and the weight on how the porphyrin analogue is used does not matter since a compound or composition is well-known in the art unless written into "a method claim". Clearly, the applicant is claiming a compound, and then the cited reference anticipates the instant invention. Applicant is not entitled to procure claims based on discovery that well-known and old compounds can be adapted to new uses; to entitle him to a patent, the compounds must be both

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new (hemin is not) and unobvious to one skilled in the art. (See In re Hack 114 USPQ 161).

Claims 2 and 4-21 are not allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kevin E. Weddington whose telephone number is (571) 272-0587. The examiner can normally be reached on 11:00 am-7: 30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Christopher Low can be reached on (571) 272-0953. fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Kevin E. Weddington

Primary Examiner

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K. Weddington July 23, 2004